

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

**Appeal No. ED99038
(Consolidated with Appeal No. ED99105)**

**SAXONY LUTHERAN HIGH SCHOOL, INC.
Respondent**

v.

**STRACK EXCAVATING, LLC and
MISSOURI LAND RECLAMATION COMMISSION
Appellants**

**Appeal from a Decision of
the Missouri Land Reclamation Commission
[Reversed by the Circuit Court of Cape Girardeau County]
[Honorable William L. Syler]**

BRIEF OF APPELLANT STRACK EXCAVATING, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	1
POINTS RELIED ON	7
ARGUMENT	9
<p>I. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK’S PERMIT APPLICATION BECAUSE AFTER OPPORTUNITY FOR A FULL EVIDENTIARY HEARING ON THE MATTER SAXONY FAILED TO ESTABLISH BY COMPETENT AND SUBSTANTIAL SCIENTIFIC EVIDENCE ON THE RECORD THAT THE PROPOSED QUARRY WOULD UNDULY IMPACT SAXONY’S HEALTH, SAFETY OR LIVELIHOOD AND ACCORDINGLY THE MISSOURI LAND RECLAMATION COMMISSION PROPERLY APPROVED THE PERMIT SUBJECT TO THE CONDITION THAT THE MINE PLAN BOUNDARY BE LOCATED ONE THOUSAND FEET FROM THE STRACK-SAXONY PROPERTY LINE IN COMPLIANCE WITH AND AS REQUIRED BY THE NEWLY ENACTED § 444.771 R.S.MO.</p>	
Standard of Review	9
A. Introduction	10
B. Construction of the Applicable Statutes Does Not Support Saxony’s Argument	14
C. Saxony’s Argument is Counter to Principles Set Forth in <i>Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. Of Natural Resources</i>	19
D. The Case Law Cited by Saxony is Not Applicable and Involves an Unrelated and Dissimilar Statutory Scheme	23

II. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK’S PERMIT APPLICATION BECAUSE UNDER THE HOLDING OF <i>LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD V. MO. DEPT. OF NATURAL RESOURCES</i> NEW NOTICE IS NOT REQUIRED FOR A CHANGE IN THE ACREAGE OF THE MINE PLAN UNLESS THERE IS A SHOWING OF PREJUDICE AND NO PREJUDICE EXISTS UNDER THE FACTS OF THIS MATTER	26
Standard of Review	26
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE.....	31
APPENDIX	

TABLE OF AUTHORITIES

CASES

<i>Hadlock v. Director of Revenue</i> , 860 S.W.2d 335 (Mo. banc 1993)	7, 15, 16, 17
<i>Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources</i> , 326 S.W.3d 38 (Mo. App. W.D. 2010)	7, 8, 13, 19, 20, 21 22, 23, 24, 26, 27
<i>Mueller v. Missouri Hazardous Waste Management Com’n</i> , 904 S.W.2d 552 (Mo. App. S.D. 1992)	24, 25
<i>Phillips v. Schafer</i> , 343 S.W.3d 753 (Mo. App. E.D. 2011)	10
<i>Ross v. Dir. of Revenue</i> , 311 S.W.3d 732 (Mo. banc 2010)	15, 16, 17
<i>State ex. rel Missouri Land Reclamation Commission v. Calhoun</i> , 34 S.W.3d 219 (Mo. App. E.D. 2000)	14
<i>Turner v. School District of Clayton</i> , 318 S.W.3d 660 (Mo. banc 2010)	15

STATUTES

§ 260.205 R.S.Mo.	25
§ 260.395.11 R.S.Mo.	24
§ 444.762 R.S.Mo.	14-15
§ 444.771 R.S.Mo.	3, 5, 11, 12, 13, 22, 23, 25, 28
§ 444.773 R.S.Mo.	7, 13, 16, 17, 24, 28
§ 444.789 R.S.Mo.	7, 13, 16, 28
§ 536.140 R.S.Mo.	9
§ 643.075 R.S.Mo.	25

§ 644.051 R.S.Mo.....	25
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RULES

84.04(f)	1
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OTHER AUTHORITIES

10 CSR 40-10.080	17
10 CSR 40-10.020(2)(E)	20
MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, Tenth Edition (1993).....	17

JURISDICTIONAL STATEMENT

Appellant¹ Strack Excavating, LLC adopts the Jurisdictional Statement set forth by Respondent Saxony Lutheran High School in its opening brief.

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Appellant Strack is dissatisfied with the completeness of Respondent Statement of Facts. Respondent's Brief provides a summary of facts and the procedural history of this matter, most of which is not in dispute. However, events and facts favorable and relevant to Appellant's position in this matter are omitted. Accordingly, Appellant Strack submits the following statement of facts for this appeal.

Appellant Strack submitted its application for a limestone quarry near Fruitland, Missouri to the Missouri Land Reclamation Commission (hereinafter the "Commission") on November 4, 2010. (Legal File [hereinafter "LF"] 22). After compliance with the statutory requirements regarding publication, notice and public comment, Strack's Permit Application was deemed complete and compliant with the law and, accordingly, approval was recommended by Mike Larsen, Staff Director of the Land Reclamation Program on January 11, 2011. (LF 87, LF 170, Res. Ex. 4). Air and water permits were issued to Strack regarding its proposed mine plan, in December, 2010 and May, 2011, respectively. (LF 91; LF 107)

¹ Pursuant to this Court's Order dated October 23, 2012 Strack remains the appellant even though Saxony filed the first brief.

On January 27, 2011, the Commission conducted a public hearing to allow parties the opportunity to argue whether they had standing² for an evidentiary hearing on the issuance of the permit. (LF 169, Pet. Ex. C). On February 7, 2011, the Commission granted Saxony's request for a formal public hearing and the matter was referred to Hearing Officer W. B. Tichenor. (LF 5).

A hearing was conducted regarding Saxony's claims over the course of four days from July 5, 2011 to July 12, 2011. (LF 172, LF 331-1038). Saxony presented testimony by 13 witnesses, which included testimony from one designated expert witness.³ (LF 128-130, 578, 631, 645, 662, 673, 687, 702, 855, 864, 876, 998, 1009, 1026). Saxony rested its case on July 12, 2011. (LF 172, LF 1026). Appellant Strack requested a directed verdict asserting that Saxony had failed to meet its burden to establish by competent and substantial scientific evidence on the record that the proposed quarry would unduly impact Saxony's health or livelihood. (LF 172, LF 1027-30). Strack's motion for directed verdict against Saxony was taken under submission and subsequently granted on July 18, 2011. (LF 47, 60).

While the hearing was taking place, House Bill 89, which contained an emergency

² To establish standing under §444.773, a person opposed to the permit must show good faith evidence that their health, safety or livelihood would be unduly impaired by the issuance of the permit.

³ Witnesses Larsen, Maevers, Cleair, Wessel, Gage, Fuchs, Mueller, Hale, Dordoni, Winter, Fiedler, Garms and Ernstmeyer. Fiedler was designated as an expert witness.

clause that provided it became effective upon approval by the Governor, was signed into law as §444.771 on July 11, 2011. (LF 140). Section 444.771 imposed a new requirement of a 1,000 foot buffer between any mine plan boundary and an accredited school, specifically providing the following:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters 643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions . . .

(LF 48, 140).

On July 11, 2011, Saxony filed a motion for Accelerated Determination seeking a ruling by the Hearing Officer that the newly enacted statute prohibited issuance of a permit to Strack. (LF 41). In response, the Hearing Officer issued an order which stated the following:

The statue does not prohibit the Commission from issuing a mining permit to the Applicant upon the condition that the mine plan boundary is beyond one thousand feet of the Saxony property. The tract of land on which the proposed Strack Quarry #2 would be located is of such size and configuration that the quarry could be outside the one thousand foot barrier established by the legislature. The Commission may still act on the pending application and satisfy the mandate of §444.771.

(LF 48-49). In response to this development, Strack did not object to the suggested conditions on its mine plan boundary, i.e. that its quarry would not be located within 1,000 feet of the boundary of Saxony Lutheran High School's real property. (LF 70, 82; Appendix A7, A10). Specifically, Strack filed its Memorandum Regarding Hearing Officer's Proposed Condition Regarding Revision of Mine Plan Boundary, which stated the following:

In the event, the Hearing Officer and/or the Land Reclamation Commission deems that the revised provisions of Section 441.771 are applicable to the permit application of Strack which was pending prior to passage of the statute at issue, Strack in order to comply with the revision to the law since its permit application was filed, is willing to agree to conditions recommended by the Hearing Officer and/or imposed by the Land Reclamation Commission to modify its proposed mine plan boundary so that Strack's mine plan boundary (exclusive of any underground mining) is not located within 1,000 feet of Saxony Lutheran High School's real property.

(LF 71; Appendix A7). Additionally, on July 22, 2011, Strack filed its Motion for Recommendation of Issuance of Permit Pursuant to Revised Mine Plan Boundary. (LF 82; Appendix A10). Strack's Motion stated the following:

To be consistent and compliant with the newly revised law, Strack has agreed to revise its Mine Plan Boundary such that Strack's mine plan boundary (exclusive of any underground mining) is not located within 1,000 feet of Saxony Lutheran High School's real property.

* * *

Applicant Strack respectfully requests that the Hearing Officer recommend that the Land Reclamation Commission issue the permit subject [to] a revised mine plan boundary that is not located within 1,000 feet of Saxony Lutheran High School's real property, and that the Land Reclamation Commission adopt such recommendation and issue the permit.

(LF 83, 85-¶6; Appendix A10 at A11-¶6).

On August 24, 2011, Hearing Officer Tichenor issued his Recommended Order which recommended that the permit be approved conditioned upon the mine plan boundary being located 1,000 feet from the Strack - Saxony property line to comply with the new Section 444.771. (LF 121, 145). On September 22, 2011, the Commission entered its Final Order adopting the Recommended Order prepared by Hearing Officer Tichenor. (LF 150). Specifically, the Final Order provided that:

Hearing Officer, W.B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of permit # 0832 be approved with the mine plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack - Saxony property line, in compliance with and as required by section 444.731 R.S.Mo.

IT IS HEREBY ORDERED THAT:

- 1) The hearing officer's Recommended Order is adopted and approved
in full

...

- 3) The captioned administrative appeal is decided against Petitioner and in favor of the Respondent and Applicant. . . .

(LF 150-151).

Saxony subsequently filed a petition for judicial review and declaratory judgment in the Circuit Court of Cape Girardeau County. (LF 153). That case was briefed and argued by the parties and on September 12, 2012, the Honorable Judge William Syler entered judgment in favor of Saxony and against Strack and the Commission. (LF 221). Strack's Motion to Amend the Judgment was denied on September 26, 2012. (LF 1, 231). This appeal followed. (LF 234, 281).

POINTS RELIED ON

POINT I

I. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE AFTER OPPORTUNITY FOR A FULL EVIDENTIARY HEARING ON THE MATTER SAXONY FAILED TO ESTABLISH BY COMPETENT AND SUBSTANTIAL SCIENTIFIC EVIDENCE ON THE RECORD THAT THE PROPOSED QUARRY WOULD UNDULY IMPACT SAXONY'S HEALTH, SAFETY OR LIVELIHOOD AND ACCORDINGLY THE MISSOURI LAND RECLAMATION COMMISSION PROPERLY APPROVED THE PERMIT SUBJECT TO THE CONDITION THAT THE MINE PLAN BOUNDARY BE LOCATED ONE THOUSAND FEET FROM THE STRACK-SAXONY PROPERTY LINE IN COMPLIANCE WITH AND AS REQUIRED BY THE NEWLY ENACTED § 444.771 R.S.MO.

§ 444.773.3 R.S.Mo.

§ 444.789 R.S.Mo.

Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources,

326 S.W.3d 38 (Mo. App. W.D. 2010)

Hadlock v. Director of Revenue, 860 S.W.2d 335 (Mo. banc 1993)

POINT II

II. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE UNDER THE HOLDING OF *LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD V. MO. DEPT. OF NATURAL RESOURCES* NEW NOTICE IS NOT REQUIRED FOR A CHANGE IN THE ACREAGE OF THE MINE PLAN UNLESS THERE IS A SHOWING OF PREJUDICE AND NO PREJUDICE EXISTS UNDER THE FACTS OF THIS MATTER.

Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources,

326 S.W.3d 38 (Mo. App. W.D. 2010)

ARGUMENT

POINT I

I. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE AFTER OPPORTUNITY FOR A FULL EVIDENTIARY HEARING ON THE MATTER SAXONY FAILED TO ESTABLISH BY COMPETENT AND SUBSTANTIAL SCIENTIFIC EVIDENCE ON THE RECORD THAT THE PROPOSED QUARRY WOULD UNDULY IMPACT SAXONY'S HEALTH, SAFETY OR LIVELIHOOD AND ACCORDINGLY THE MISSOURI LAND RECLAMATION COMMISSION PROPERLY APPROVED THE PERMIT SUBJECT TO THE CONDITION THAT THE MINE PLAN BOUNDARY BE LOCATED ONE THOUSAND FEET FROM THE STRACK-SAXONY PROPERTY LINE IN COMPLIANCE WITH AND AS REQUIRED BY THE NEWLY ENACTED SECTION 444.771 R.S.MO.

Standard of Review

The applicable standard for appellate review of a contested case is as follows:

Appellate review of a decision in an agency contested case is set forth in Section 536.140 R.S.Mo. Under this standard, the agency's decision will be upheld unless it (1) is in violation of constitutional provisions; (2) is in excess of the statutory authority or

jurisdiction of the agency; (3) is unsupported by competent and substantial evidence upon the whole record; (4) is, for any other reason, unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; or (7) involves an abuse of discretion. *Phillips v. Schafer*, 343 S.W.3d 753, 757 (Mo. App. E.D. 2011). On appeal from the circuit court's review of an agency's decision, this Court reviews the action of the agency. *Id.* This Court must decide whether, considering the whole record, there is sufficient competent and substantial evidence to support the agency's actions. *Id.* This standard is not met in the rare case in which the agency's decision is contrary to the overwhelming weight of the evidence. *Id.* “The decision of the agency on factual issues is presumed to be correct until the contrary is shown and the court is obliged to sustain the administrative order if it is supported by substantial evidence on the record as a whole.” *Id.* When the agency's decision involves a question of law, the court reviews the question of law de novo.

A. Introduction

In addressing Saxony's appeal in this matter, it is important to note that Saxony was afforded a full evidentiary hearing on Strack's permit application. After four days of testimony by twelve lay witnesses and one expert witness, Saxony rested its case. The Hearing Officer ruled that Saxony failed to meet its required burden to establish by competent and substantial scientific evidence on the record that the proposed quarry would unduly impact Saxony's health, safety or livelihood. The Commission subsequently adopted and approved the Hearing Officer's findings. Saxony has not

challenged the Commission's decision in that regard, and no argument has been made that the Commission's decision was not supported by the evidence, or was arbitrary, capricious or unreasonable. Accordingly, it is not in dispute that Saxony was provided a full and complete opportunity to challenge Strack's permit application before the Commission, and, having fully availed itself of that opportunity, the Commission ruled against Saxony and in favor of issuance of the permit to Strack.

Having failed to make its case during the evidentiary hearing, Saxony instead argues that this Court should set aside the decision of the Commission because the Commission approved the permit subject to a requirement that Strack's mine plan boundary be moved one thousand feet away from Saxony's property line. The factual circumstances which necessitated that lone requirement imposed by the Commission are unique. Specifically, after eight months of efforts by Strack in the permitting process, § 444.771 R.S.Mo. was created by House Bill 89 to provide a new requirement that a permit should not be issued for any mine plan boundary that is located within one thousand feet of an accredited school. No such limitation existed prior to the enactment of House Bill 89. House Bill 89 also contained an emergency clause so that its enactment was immediate upon being signed by the governor, which occurred on July 11, 2012, the third day of a four-day evidentiary hearing that was taking place. As a result, prior to the new § 444.771 becoming effective, Strack's permit application had been submitted, had been deemed complete and compliant with the law, was over eight months through the statutory process and was in the midst of an evidentiary hearing afforded to Saxony to challenge the permit.

It is also noteworthy that the requirement that the mine boundary be moved back 1,000 feet from Saxony's property line in order to be compliant with the new requirements of § 444.771 is the sole change between the original permit application and the permit approved by the Commission. This lone requirement imposed by the Commission was solely the result of the aforementioned change in the law. Faced with the enactment of the § 444.771, Strack did not object to the additional requirement and filed a Memorandum and a motion with the Hearing Officer stating that it was willing to agree to the revised boundary to comply with the newly revised statute. (LF 70, 82). Strack's motion specifically stated the following:

To be consistent and compliant with the newly revised law, Strack has agreed to revise its Mine Plan Boundary such that Strack's mine plan boundary (exclusive of any underground mining) is not located within 1,000 feet of Saxony Lutheran High School's real property. . . . Applicant Strack respectfully requests that the Hearing Officer recommend that the Land Reclamation Commission issue the permit subject [to] a revised mine plan boundary that is not located within 1,000 feet of Saxony Lutheran High School's real property, and that the Land Reclamation Commission adopt such recommendation and issue the permit.

(LF 83 - ¶6; Appendix A11 - ¶6). In short, but for the enactment of § 444.771 at the eleventh hour of the process, the permit would have been issued by the Commission without any changes or additional requirements since Saxony was unable to establish any undue impact during the evidentiary hearing.

Saxony's argument in this matter - that the Commission acted in excess of its authority by imposing a requirement on Strack to bring it in compliance with the new provisions of § 444.771 - is misplaced. It is directly counter to the principles established in *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010),⁴ ignores the comprehensive statutory scheme adopted by the legislature, and ignores specific language used in the statutes. Notably, the statutes at issue specifically provide for "a public hearing to formally resolve concerns of the public" and provide that the designated hearing officer shall "hold the hearing and make recommendations to the commission." §§ 444.773, 444.789 R.S.Mo. Saxony's argument ignores, and is in conflict with, these provisions. Saxony would restrict the Commission's function to solely rendering a "yes" or "no" decision on the permit application exactly as submitted, without any flexibility on the part of the Commission to make changes or impose additional requirements to the permit application to resolve issues raised by the public. Restricting the Commission as such would impair its ability to perform its mandated function of balancing the needs of the surface mining industry and concerns of the public.

In short, Saxony had a full and complete evidentiary hearing on its claims and failed to establish grounds for denial of the permit. Saxony has also received the benefit of the newly enacted provisions of Section 444.771 by virtue of the Commission's imposition of the required 1,000 foot buffer between the mine plan boundary and Saxony's property.

⁴ A copy of the opinion in *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources* is attached to the appendix to this brief - Appendix at page A15.

Despite this, Saxony argues that it has somehow been aggrieved and that Strack should be required to start the entire permitting process over, causing additional and unnecessary delay, expense and detriment to both Strack and the Commission. Saxony's arguments are misplaced. The Commission's ruling was proper, within its authority, and should be affirmed by this Court.

B. Construction of the Applicable Statutes Does Not Support Saxony's Argument

Saxony erroneously argues that the Commission lacks statutory authority to condition or allow modification of the permit plan. Missouri case law notes that the Missouri General Assembly created a comprehensive statutory scheme to regulate the mining industry and delegated to the Land Reclamation Commission the authority to enforce this scheme. *State ex. rel Missouri Land Reclamation Commission v. Calhoun*, 34 S.W.3d 219, 220-21 (Mo. App. E.D. 2000). The statutory scheme empowers the Commission to, "among other things, adopt rules and regulations, conduct investigations, examine and pass on new conservation plans, monitor compliance with mining regulations, conduct hearings, and order the forfeiture of bonds for failure to take corrective actions . . . revoke permits, order the cessation of mining operations, and to institute legal proceedings to enforce the statutory scheme and its own orders." *Id.* Further, the Declaration of Policy for the Land Reclamation Act provides that it is the "policy of this state to strike a balance between surface mining of minerals and reclamation of land subject to surface disturbance by surface mining as contemporaneously as possible, ... and to protect and promote the health, safety and

general welfare of the people of this state. Section 444.762 R.S.Mo.

The Commission's ability to act during the permitting process to balance the public's interests with the proposed mining activity is inherent in such directives and is unique within the statutes and regulations applicable to land reclamation. If the Commission is charged with striking a balance between surface mining and the interests of the public, it must be allowed the power to direct and condition surface mining upon terms and conditions that it deems appropriate to achieve that goal. To hold otherwise would require a finding that the Commission is granted broad, comprehensive and discretionary powers to regulate the surface mining industry, but is not vested with any authority to modify or condition a permit application upon terms and conditions when necessary to carry out its stated directive. Logic dictates against such an argument.

Further, the statutory language used supports such a conclusion and rejects Saxony's argument that the Commission lacks any authority to impose requirements during the permitting process. The seminal rules of statutory construction are not disputed. The goal is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning. *Turner v. School District of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010). Importantly, each word, clause, sentence and section of a statute should be given meaning. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993). "Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity." *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010). Where statutory interpretation is necessary, statutory language is

considered in context and in comparison with other sections to determine its meaning. *Id.*

Here, § 444.773 specifically authorizes the Commission, if a written request is made, to “grant a public hearing to formally *resolve* concerns of the public.” § 444.773.3 R.S.Mo. (emphasis added). Section 444.789 then sets forth the administrative procedure if such a hearing is granted. It provides that the designated hearing officer shall “hold the hearing and make *recommendations* to the commission, but the commission shall make the final decision thereon” R.S.Mo. 444.789 (emphasis added). Conspicuously absent from Saxony’s brief is reference to these provisions or any attempt to give affect to this language. *See, Hadlock*, 860 S.W.2d at 337.

The argument offered by Respondent Saxony ignores the language used in § 444.789. That statute specifically provides that the hearing officer has authority to hold the hearing and make *recommendations* to the Commission. Of importance is that the word used by the legislature - recommendations - is plural and not singular. If the hearing officer was limited to hearing the evidence and solely ruling either “yes” or “no” on whether the permit should issue exactly as submitted, his authority would be limited to making a singular ruling or a singular recommendation. That is not the language the legislature used. Instead the hearing officer is charged with making “recommendations” to the Commission. The use of the plural form necessarily reflects that what is required of the hearing officer is more than just a singular decision on whether the permit should be issued exactly as submitted. “Recommendations,” plural, encompasses a far greater level of activity by the hearing officer and the Commission, including recommending appropriate terms and conditions to the permit based upon the evidence at the hearing.

Saxony's argument would revise the language of the statute to limit the hearing officer solely to making a singular decision, and would preclude the hearing officer from making recommendations, the plural word specifically used by the Legislature, or the Commission from adopting such recommendations. Saxony's overly narrow and restrictive interpretation is directly counter to the aforementioned principles of statutory construction - that the specific words used by the legislature must be given effect and interpreted according to their plain meaning. *Hadlock*, 860 S.W.2d at 337; *Ross*, 311 S.W.3d at 735.

Further, the conclusion that the Commission acted within its authority is evidenced by the language of Section 444.773 which authorizes a public hearing to *resolve* concerns of the public. A common definition of "resolve" in such a context means to "to deal with successfully, to clear up, *to find an answer to.*" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, Tenth Edition (1993)(emphasis added). Accordingly, the Hearing Officer is not charged solely with deciding the case, but is charged with the much broader directive of resolving the issues or concerns of the public. Again, such language clearly contemplates that the Hearing Officer and Commission are not limited to simply hearing the evidence and issuing a "yes" or "no" ruling on the permit application, but instead are allowed to impose requirements or restrictions to address and "resolve" any public concerns that are established during the approval process.

Similarly, pursuant to rules promulgated by the Department of Natural Resources, any effected person can request a public meeting with the applicant, the purpose of which is to attempt to resolve any concerns. *See* 10 CSR 40-10.080. It makes no sense that, if the applicant elects to have a public meeting, the applicant is solely limited to attempting

to convince the public that their concerns are not correct, and cannot modify, change or condition its operations based upon the public comments in an effort to resolve such concerns without starting the process anew. It defies logic to suggest that the legislature created a comprehensive scheme and process to address and “resolve” issues raised by the public during the permitting process, but that the Commission is devoid of any authority to actually take any action to modify the permit or resolve such issues or concerns.

As here, circumstances after the filing of the permit application can and do change. Issues can be raised during the process, including during any public or formal hearing, that might merit changes to the permit, or imposing additional requirements or restrictions on the applicant, but which do not merit wholesale rejection of the permit. Accordingly, the Commission must have the authority to adapt and react accordingly to such changed circumstances by crafting an appropriate resolution. Any argument to the contrary ignores the purpose and comprehensive nature of the statutory scheme adopted by the legislature. Charging the Hearing Officer and Commission with the obligation to make “recommendations” and to “formally resolve concerns of the public” has no meaning if they have no means by which to accomplish these directives. The Commission must be allowed to impose whatever conditions it deems necessary to fully carry out its duty and directive to regulate the mining industry and ensure that any permit issued is consistent with the law and is balanced with any legitimate concerns of the public. This is especially true in the circumstances of the present case where the only change made to the permit application is to bring it into compliance with a subsequent and unanticipated change

to the law. To hold otherwise would unduly restrict the function of the Hearing Officer and Commission and would preclude their ability of to actually resolve concerns of the public during the process, thereby defeating the very purpose of the statutory scheme created by the legislature.

C. Saxony's Argument is Counter to Principles Set Forth in *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. Of Natural Resources*

The process that occurred in the present matter is similar to that which occurred and was upheld in *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010).⁵ In *Lake Ozark* an application for an expansion permit was approved after the application was revised during the permitting process to include easements not shown in the original application. *Id* at 41. Additionally, the original mine plan requested mining of 205 acres, but approval was limited to 52 acres. *Id.* at 39, 41. Further, the Hearing Officer imposed numerous additional special conditions with respect to approval of the permit, including restricting the days, times, and location of the blasting with regard to the sewer line easement; using seismographs to monitor the sewer plant and sewer lines; and restricting the elevation of the mine floor to run at or above the grade of the sewer line easement. *Id* at 40, f.n. 4. As reflected in *Lake Ozark*, the practice of imposing special conditions as part of the permit process is not

⁵ The decision of the Commission was ultimately reversed and remanded in *Lake Ozark* on other, unrelated grounds, specifically, the Commission's use of the wrong burden on proof. 326 S.W.3d at 43-44.

uncommon, and is entirely consistent with the Commission's goal and purpose of striking a balance between the public's interests and the proposed mining activity during the permitting process.

Moreover, in *Lake Ozark*, the applicant's original permit application was not correct; specifically utility easements were not shown in the maps of the mine submitted by the applicant as required by 10 CSR 40-10.020(2)(E). *Id.* at 41. The application was later revised by the applicant to include this additional information midway through the process and *after* the required publication regarding the mine plan. *Id.* at 41-42. Parties opposing the permit argued that this change to the proposed permit required the applicant to start the entire process over from the beginning. The court rejected such arguments holding that where all information was before the Land Reclamation before the issuance of the permit (as here) and where no prejudice results from any changes (as here, as detailed further *infra*), issuance of the permit by the Land Reclamation Commission was not improper or illegal. *Id.*

In the present matter, the modification of Strack's mine plan during the process is far less problematic than in *Lake Ozark*. Unlike the applicant in *Lake Ozark*, Strack's modification does not seek to rectify any errors or omissions on Stack's part in the application process. To the contrary, Strack's original mine plan was fully compliant with the law that existed at the time Strack submitted its application. Unlike *Lake Ozark*, the modification in the present matter is not the result of any mistake, fault or oversight on the part of Strack. Instead, it is simply an effort to bring the permit into compliance with an unexpected change to the law that occurred at the very end of the permitting process. If

modification of the permit to correct errors by the applicant uncovered midway in the permit process is allowable as in *Lake Ozark*, it defies logic to suggest that modification of a permit, which was accurate and compliant with the law when made, to conform to changes in the law during the permitting process is summarily prohibited. Counter to Saxony's argument, *Lake Ozark* provides strong support for Strack's position in this matter that new notice is not required and Strack is not required to start the process anew.

Additionally, under the holding of *Lake Ozark*, changes to the permit during the permitting process do not serve as a basis to overturn the Commission's decision unless there is a showing of prejudice. 326 S.W.3d at 42-43. No such prejudice exists in the present matter. Here, the requirement imposed by the Commission and modification of the mine plan quite simply reduced the proposed mineable acreage by moving the boundary 1,000 feet away from the school. It did not revise any other boundary, did not expand or change any other mining locations, and did not change anything of substance within the mine plan. Since the modification only served to substantially limit and reduce the scope of mining set forth in the original application, absolutely no prejudice exists or can be shown by Saxony.

It would be specious for Saxony to argue that it could have attempted to present a case of greater impact to its health, safety or livelihood based upon a mine plan that was modified to be a much greater distance from Saxony's property line and was also substantially reduced in scope from what was originally proposed. Saxony had a full evidentiary hearing on its concerns regarding the original proposed mine plan. After four days of testimony, the Hearing Officer found that Saxony failed to establish proof for any

claim that the proposed quarry would have any undue impairment on the health or livelihood of Saxony. The Commission approved and adopted this finding. If no impact was shown during the evidentiary hearing for the original mine plan, it is beyond cavil that no impact exists for the mine plan that the Commission subsequently approved which substantially reduced the mineable acreage due to the imposed 1,000 foot setback to comply with the mandate of the new § 444.771. It is without merit for Saxony to suggest that a different result would have occurred or that Saxony has somehow been prejudiced in this matter.

It similarly defies logic to suggest that persons who did not challenge the original mine plan would have petitioned for hearing based upon this far more limited mine plan. It is also equally illogical to assert that persons who were denied standing under the original plan would have been granted standing under the subsequent reduced and far more limited mine plan. Quite simply, absolutely no prejudice can be claimed by Saxony or any other party as a result of the Commission's revision of Strack's mine plan. In short, the requirement imposed by the Commission did not create any potential additional public concerns, but pragmatically significantly lessened them. Under the holding of *Lake Ozark*, the lack of any prejudice to Saxony precludes its current objections regarding the modification of the permit.

Under the circumstances presented, it is unreasonable to suggest that Strack and the Commission must begin the entire process anew and incur significant costs and delays in repeating the exact same process. Strack has incurred significant time and expense proceeding with the application process and at all times has done so consistent with the

law as it existed at the time. Strack's application and mine plan were entirely consistent and compliant with the law when it was filed. Strack has obtained an air permit and a water permit as required by the process. It has performed its required notice and publication requirements. It has participated in a public hearing, and subsequently participated in a four day formal evidentiary hearing. Over the course of a period of eight months, from the time of its application in November, 2010 until Saxony was provided a full evidentiary hearing in July, 2011 at which Saxony's claims were denied, Strack has fully acted in accordance with the law as it existed and has incurred substantial cost and expense doing so. Saxony has been provided a full evidentiary hearing on its claims, and the Commission recommended approval of the permit. Moreover, Saxony and the public have received the full benefit of the newly enacted provisions of § 444.771 by virtue of the Commission's imposition of the required 1,000 foot buffer between the mine plan boundary and Saxony's property. Requiring the entire process to start over from the beginning would serve no purpose other than to delay the same result, and would be an inefficient and wasteful use of government and judicial resources. The court in *Lake Ozark* expressly rejected such an outcome. The same rationale applies in the present matter and no basis exists to overturn the decision of the Commission under the facts presented.

D. The Case Law Cited by Saxony Is Not Applicable and Involves an Unrelated and Dissimilar Statutory Scheme

Saxony offers no Missouri case which holds that that the Missouri Land Reclamation Commission lacks authority to impose requirements in the permit as part of the permitting

process, nor does Saxony offer cases which address the statutory scheme at issue - the comprehensive and discretionary powers afforded the Missouri Land Reclamation Commission to regulate the surface mining industry. Instead, as addressed previously, Saxony's argument is directly counter to the Commission's practice of imposing requirements and revising applications during the permitting process as approved by *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38 (Mo. App. W.D. 2010). Moreover, the case primarily relied upon by Saxony in support of its position, *Mueller v. Missouri Hazardous Waste Management Com'n*, 827 S.W.2d 217, 221 (Mo. App. S.D. 1992), addresses an entirely different statutory scheme, unlike the one at issue.

Mueller involved an appeal of a hazard waste permit under the Missouri's hazardous waste management law. However, Missouri's hazardous waste management law addressed in *Mueller* is different than the statutory process enacted for the Missouri Land Reclamation Commission. Under Missouri's hazardous waste management law, public challenges can occur only *after* the permit has been issued. Compare § 444.773.3 R.S.Mo. and § 260.395.11 R.S.Mo. Nothing within the hazardous waste management statutory scheme allows members of the public to petition for a hearing prior to the issuance of the permit. Nothing within that process allows for the Hearing Officer to make recommendations as part of concerns raised by the public during the permitting process. Further, the statutory scheme for Missouri's waste management law does not provide for a hearing during the permitting process to "resolve concerns of the public."

Unlike Missouri's hazardous waste management law, the statutory scheme created by the legislature for the Land Reclamation Commission involves a far different procedure; a procedure in which the public is afforded the opportunity and a process by which it can raise, have addressed, and seek resolution of concerns *prior* to the issuance of the permit. As addressed previously, that process, and the language used by the legislature defining that process, allows for the Missouri Land Reclamation Commission to undertake efforts to solve public concerns through meetings and hearings before a surface mining permit is issued. The same opportunity, process, and statutory language is not present or addressed in *Mueller*. *Mueller* is inapposite to the statutory scheme and circumstances presented here.

Similarly, the other statutes that Saxony cites involve differing procedures and statutory schemes. None of the statutory schemes involve a procedure in which persons who contend their health, safety or livelihood will be affected by issuance of the permit can potentially obtain a hearing prior to issuance of the permit in order to seek a resolution of their concerns prior to issuance of the permit. See § 260.205 (solid waste); § 643.075 (air); and §644.051 (water). The same opportunity, process, and statutory language that exists for the issuance of a mining permit by the Land Reclamation Commission is simply not present in any of the other statutory schemes cited by Saxony.

In summary, both the language of statutes at issue, as well as the holding of *Lake Ozark* which addresses the statutory scheme at issue, supports the conclusion that the Commission's actions in this matter were within its authority. Saxony had a full evidentiary hearing on its claims and failed to establish grounds for denial of the permit. Saxony has also received the benefit of the newly enacted provisions of Section 444.771 as a result of

the Commission's actions. No prejudice exists to Saxony from what has occurred and the Commission's ruling was proper and within its authority. Accordingly, the Commission's decision should be affirmed by this Court.

POINT II

II. THE MISSOURI LAND RECLAMATION COMMISSION DID NOT ERR IN APPROVING STRACK'S PERMIT APPLICATION BECAUSE UNDER THE HOLDING OF *LAKE OZARK/OSAGE BEACH JOINT SEWER BOARD V. MO. DEPT. OF NATURAL RESOURCES* NEW NOTICE IS NOT REQUIRED FOR A CHANGE IN THE ACREAGE OF THE MINE PLAN UNLESS THERE IS A SHOWING OF PREJUDICE AND NO PREJUDICE EXISTS UNDER THE FACTS OF THIS MATTER.

Standard of Review

Appellant Strack adopts the Standard of Review from Point I. *See* pages 9-10, *supra*.

In its second point, Saxony argues that because the size of Strack's mine plan was revised from a 76 acre mine to a 53 acre mine by the Commission's imposition of a 1,000 foot buffer from Saxony's property, Strack was required to issue new notice and start the permitting process anew. Again, as addressed previously, such an argument is directly counter to the holding of *Lake Ozark*.

As previously noted, in *Lake Ozark* an application for an expansion permit was approved, but only after special conditions were imposed by the Hearing Officer. The original mine plan requested mining of 205 acres, but the approved mining area was limited to 52 acres. 326 S.W.3d at 39, 41. In *Lake Ozark*, the mine plan was significantly reduced and the Commission's approval of the permit subject to the significantly reduced acreage held to not be improper. *Id.* at 42-43. The court rejected the argument that the applicant was required to start over and issue new notice, the same argument now offered by Saxony. *Id.* The facts and holding of *Lake Ozark* expressly reject Saxony's position in this matter that new notice is required by the applicant if the mine plan acreage is reduced during the permitting process.

As addressed in detail in Point I, *Lake Ozark* holds that if all information was before the Commission before the issuance of the permit and no prejudice results from any changes, issuance of the permit by the Commission is not improper or illegal. *Id.* The same result is applicable here. No argument exists that the Commission did not have all information before it when it issued the permit. Further, as addressed in detail *supra*, absolutely no prejudice exists or resulted from the Commission's imposition of a 1,000 foot setback from Saxony's property and the significantly reduced mine plan that resulted. Accordingly, as in *Lake Ozark*, issuance of the permit by the Commission was proper and should be upheld. Counter to Saxony's arguments, the facts of *Lake Ozark* are analogous to the present situation and provide strong support for Strack's position that the Commission's actions were lawful and proper.

CONCLUSION

Respondent Saxony's arguments in this matter ignore the language used in § 444.789 and § 444.773, and defeat the statutory scheme established by the legislature for the permitting process for the Commission. Further, Saxony's arguments are directly counter to *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*. Absolutely no prejudice has resulted from the Commission imposing the requirement of a 1,000 foot setback in the permit in order to bring the permit into compliance with the newly enacted § 444.771. Saxony has received the benefit of a full evidentiary hearing on its claims, and has additionally received the benefit of the newly enacted provisions of § 444.771. Under the circumstances presented, it is both unwarranted and unreasonable to suggest that Strack and the Commission must begin the entire process anew and incur significant costs and delays in repeating the exact same process. The holding of *Lake Ozark* expressly rejects such an outcome. The rationale of *Lake Ozark* applies in the present matter and no basis exists to overturn the decision of the Commission under the facts presented.

For the reasons set forth herein, the September 22, 2011 Final Order of the Commission, which granted the permit to Strack subject to the mine plan boundary being revised to be located 1,000 feet from the Strack Saxony property line, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

**Certificate Pursuant To Rules 84.06(C) and 84.04(G)
and Local Rules 360 and 361**

The undersigned counsel for Appellant hereby states:

- 1) The foregoing brief contains 7,733 words, which is within the applicable limitations in length set forth in Rule 84.06(b);
- 2) Appellant certifies this electronic version of this brief that is provided has been scanned for viruses under Trend Micro Client/Server Security agent v 5.1, and has been found to be virus-free; and
- 3) Appellant's Brief complies with the limits of Local Rule 360.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of January, 2013, the foregoing was filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system upon the following:

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